Petition

Office-Supreme Court, U.S.
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81-190
NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH P. UZZOLINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement of Questions Involved

1. Whether an appeal by the government from a court ordered judgment of acquittal after verdict is authorized by statute?

2. Whether a jury verdict which is patently inconsistent and repugnant should be allowed to stand?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph P. Uzzolino, Petitioner, prays that a Writ of Certiorari issue to review the judgment from the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 15, 1981. (Appendix B)

Opinion Below

The opinion of the Court of Appeals for the Third Circuit is not yet reported and is printed in full as Appendix A.

Jurisdiction

The Judgment of the Third Circuit Court of Appeals was entered on June 15, 1981. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254 (1).

Constitutional Provisions Involved

Fifth Amendment to the Constitution of the United States (reprinted as Appendix D).

Statutes Involved

Title 18, United States Code, Section 3731; Title 18, United States Code, Section 1954. (Reprinted as Appendix E)

Statement of the Case

The Petitioner, Joseph P. Uzzolino, was indicted by a Federal Grand Jury in the District of New Jersey charged in eleven counts with violations of Title 18, United States Code, Section 1954 and Title 18, United States Code, Section 664. After trial before a District Judge and a jury, the Petitioner was acquitted on all counts except Count One which purported to charge a conspiracy to receive fees, kick-backs, commissions, gifts, loans, money and things of value because of and with the intent to be influenced with respect to actions and matters concerning the Welfare Fund and Pension Fund of a Union. On timely motion pursuant to the provisions of Rule 29 (c) of the Federal Rules of Criminal Procedure, the trial court en-

tered a Judgment of Acquittal on that remaining count. Subsequently, the government appealed to the Court of Appeals for the Third Circuit from that Judgment of Acquittal. The Court of Appeals reversed the judgment of the District Court and ordered the Petitioner's conviction on the single count to be reinstated. A petition for rehearing was filed, together with an alternative suggestion of rehearing In Banc. That petition was denied July 16, 1981 (Appendix C).

Statement of the Reasons for Granting the Writ

1. The government did not have the statutory right to appeal from a Judgment of Acquittal after verdict.

One of the points argued by the Petitioner in the Court of Appeals was that there was no statutory authority for a government appeal from a Judgment of Acquittal in a criminal case. The plain language of Title 18, United States Code, Section 3731 makes it perfectly clear that there is no authority for appeals from acquittals. The Court, in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 575, 97 S. Ct. 1349, 1356, 51 L. Ed. 2d 642 (1977), concluded that a judgment under Rule 29 is to be treated uniformly. It was further concluded that the double jeopardy clause (Amend. V) bars appeal from an acquittal entered under Rule 29 (c) after a jury's mistrial as well as one under Rule 29 (a) or 29 (b).

Though this court seems to state in *United States* v. *Wilson*, 420 U.S. 332, 36-339, 95 S. Ct. 1013, 1018-1019, 43 L. Ed. 2d 232 (1975); *United States* v. *Jenkins*, 420 U.S. 358, 363-364, 95 S. Ct. 1001, 1010, 43 L. Ed. 2d 250 (1975), and *Serfass* v. *United States*, 420 U.S. 377, 383-387, 95 S. Ct. 1055, 1060-1061, 43 L. Ed. 2d 265 (1975), that an ap-

peal is authorized from a post verdict Judgment of Acquittal, we submit that the statutory issue has not yet been raised nor has it been dealt with in this court.

The statute unequivocally permits a government appeal to the Court of Appeals "from a decision, judgment, or order of a District Court *dismissing an indictment* information as to any one or more counts . . ." (Emphasis added). That statute further modifies the right to appeal from a dismissal by prohibiting an appeal where the double jeopardy clause would prevent any future prosecution. It is the position of the Petitioner that the court need not reach the issue of double jeopardy in order to determine that the government does not possess the statutory authority to proceed with an appeal from a post verdict Judgment of Acquittal. This court has stated on many occasions that the only basis for an appeal by the government in a criminal case is that which is afforded by statute. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977), *United States* v. *Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 232 (1975), *United States* v. *Sanges*, 141 U.S. 310, 12 S. Ct. 609, 36 L. Ed. 445 (1892). The statute, clear on its face, reveals *no ground for appeal from a Judgment of Acquittal* either before verdict or pursuant to Rule 29 (c) of the Federal Rules of Criminal Procedure. The legislative history seems unambiguous and makes it quite clear that Congress neither authorized nor intended to authorize appeals from a Judgment of Acquittal under any circumstances.

There does not seem to be any ground for argument that the section involved here (18 U.S. Code Section 3731) must be strictly construed against the government's right of appeal. *Will* v. *United States*, 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967). Though the *Will case* dealt with the statute prior to its most recent amendments there is

no reasonable basis for a change in the attitude of the Court toward the right of appeal in criminal cases notwithstanding the provision of that section as amended.

Congress has not demonstrated the intention to revise, completely, the generally unfavored position of the appeals by the Government in criminal cases. It must be assumed that Congres was fully aware that a dismissal of an indictment was far different from a Judgment of Acquittal and that had Congress intended that the Government be given the right to appeal from a Judgment of Acquittal, even one entered by the Court after a verdict to the contrary, it could have spelled out such an intent.

2. The trial Court properly granted a Judgment of Acquittal after verdict.

This Court in *Dunn* v. *United States,* 284 U.S. 390, 52 S. Ct. 189, 190, 76 L. Ed. 356 (1932) established a principle quite narrow in scope which has since produced progeny which have not taken cognizance of the true import of that decision. In that case Justice Holmes said "Consistency in the verdict is not necessary." (284 U.S. 393) The Justice went on to explain why such was the case. He said that each count in an indictment must be treated as though it were a separate indictment. His decision was that when considering the impact of an acquittal in a multi count indictment as against convictions on other counts in the same indictment, care should be taken to make a determination as to whether if each count had been tried separately, an acquittal on the first count could be treated as res judicata of the others.

While the decision in *Dunn* does hold that inconsistent verdict are permissible under certain conditions, it is submitted that that rule should only be applied where the rea-

son for it is also present. See *United States* v. *Hannah*, 584 F2d 27, 30 (3rd Cir. 1978).

In the present case, the jury by its verdict found that the defendant was not guilty on a series of charges, each almost identical, which were, in fact, supported by the identical evidence upon which the government based its prosecution on the single count on which the defendant was found guilty. In essence, each of the counts of the indictment, the one upon which the defendant was found guilty and the others upon which he was acquitted, were substantially identical charges. It was contended in the trial Court and on appeal by the defense that the verdict was not merely inconsistent but was truly repugnant.

It appears that there can be no real argument against the assertion by the defendant that if each of the counts had been contained in a separate indictment and had an acquittal be rendered on one of the counts the defendant could have pleaded res judicata, collateral estoppel and autrefois acquit on any of the others.

It is the position of the petitioner here that this Court should underscore the limited impact of *Dunn* v. *United States, supra,* and exercise its supervisory powers over the Courts of the United States in this instance by granting the Petition.

The Petitioner, here, was in a situation far different from that of the Petitioner in *Dunn* v. *United States, supra.* In this case he is faced with a verdict patently based upon the assumption of power by the jury to which they were improperly disposed by a great reluctance to allow the Petitioner to walk from the courtroom unfettered.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2287

UNITED STATES OF AMERICA,

Appellant,

v.

UZZOLINO, JOSEPH P.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D. C. Criminal No. 79-00366-01

Argued February 24, 1981

Before: ADAMS, ROSENN and HUNTER, *Circuit Judges*
Opinion filed June 15, 1981

James A. Plaisted (Argued)
William W. Robertson
Maryanne Trump Desmond
Attorney for Appellant

Appendix A

S. M. Chris Franzblau (Argued)
Franzblau & Falkin
Attorneys for Appellee

HUNTER, *Circuit Judge*:

1. In June, 1980, appellee, Joseph P. Uzzolino, was charged under 18 U.S.C. §371 (1976) with conspiracy to receive kickbacks in violation of 18 U.S.C. §1954 (1976), and conspiracy to embezzle pension fund assets in violation of 18 U.S.C. §664 (1976). In addition to the conspiracy count, the defendant was also charged with eleven counts of specific violations of sections 664 and 1954. A jury found Uzzolino guilty of conspiracy, but acquitted him on the substantive crimes of embezzlement and receiving kickbacks. The trial court, believing the verdicts to be inconsistent, granted appellee's Fed.R.Crim.P. 29(c) motion and set aside the jury's verdict on the conspiracy count. On July 24, 1980, the district court entered a judgment of acquittal for the appellee.

2. The Government appeals from that judgment. It argues that even under the wording of the indictments in this case, conspiracy is a separate offense from the substantive acts in furtherance of that conspiracy. The Government therefore asserts that it was within the province of the jury to find the defendant guilty of one and not the other. We agree. Therefore, we will reverse the district court's judgment and order appellee's conspiracy conviction to be reinstated.

Appendix A

Facts

Background

3. Appellee was charged with conspiring to embezzle Pension and Welfare Fund assets; conspiring to receive kickbacks as trustee of the fund; accepting kickbacks; and embezzling Pension Fund assets. The alleged offenses occurred during Uzzolino's tenure as President and Business Agent of Local 478, an employe eorganization entrusted with the management of an Employee Pension Benefit Plan. In November, 1975 appellee met at a roadside diner with Sam Mor, the owner of Towers Transportation, Inc. ("Towers") a company owing approximately $80,000 to the Pension and Welfare Fund. At that meeting, Mor offered to pay appellee $10,000, in $2,500 installments, if appellee would use his influence as President and Business Agent of the Fund to help Mor escape payment of the $80,000 debt. He also offered to pay appellee $1,000 a month if he would turn his back on Mor's use of non-union owner-operators.

4. The next day appellee agreed to Mor's proposal. After receiving the cash, appellee instructed Albert S. Parsonnett, attorney for the Fund, not to seek collection of the Towers' debt. Shortly thereafter, the Fund's billing statement to Towers ceased to reflect Tower's substantial delinquency to the Fund. The Fund also decided not to strike Towers, as it had done before, in an attempt to force payment of the delinquent Welfare Fund contribution. Towers never paid its delinquent contributions and it failed to keep up its current contributions to the Fund. Consequently, the Company's insurance lapsed and some of the workers were forced to pay their own hospital bills. Still, the Fund did not press Towers for payment.

5. Finally, in May 1976, Mor and appellee discussed a plan to change the corporate shell of Towers. Mor changed the name of the trucking firm to Far East Truck Leasing ("Far East"). Far East, the same company as Towers except for the changed name, was never asked to pay the Towers obligations, including the judgment on a suit which had been initiated prior to appellee's agreement with Mor. Far East eventually defaulted on its contributions to the Fund causing the employees' insurance to be cancelled for non-payment.

The Indictments

6. The Government brought an eleven count indictment against appellee. Count 1, described by the trial judge as a conspiracy indictment, charged in part:

> From in and around November 1975 until approximately in and around the end of 1976 at Elizabeth in the District of New Jersey and elsewhere, the defendants
>
> JOSEPH P. UZZOLINO,
> JOSEPH A. UZZOLINO and
> JOSEPH AMENDOLA
>
> *did knowingly and wilfully combine conspire, confederate and agree with each other and with others to commit offenses against the United States,* that is to receive fees, kickbacks, commissions, gifts, loans, money and things of value because of and with the intent to be influenced with respect to actions, decisions and other duties relating to questions and matters concerning the Welfare Fund and the Pension Fund in violation of Title 18, United States Code, Section 1954.

Appendix A

Redacted Indictment at 2, *reprinted in* Appendix at 26 (emphasis added). The conspiracy charge was broken down into two parts. Paragraphs 12 and 13 of Count 1 of the indictment discussed the payments to hinder collection of the $80,000 debt; Paragraphs 14 and 15 outlined the conspiracy to permit use of non-union owner-operators in return for a monthly $1,000 payment. Finally, the last section of Count 1 described the alleged overt acts committed by appellee and his co-conspirator in furtherance of the conspiracy.

7. Counts 2 through 9 of the indictment then charged specific violations of section 1954 by the appellee.[1] In drafting these counts, the Government tracked substantially the language of section 1954 which states, in relevant part, "Whoever . . . receives or agrees to receive . . . any . . . kickback . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both . . ." 18

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[1] Only counts 2 through 9 become important for this appeal since only those counts possibly overlap with the conspiracy charge of count 1. Counts 10 and 11 addressed the crime of embezzlement under 18 U.S.C. §664 (1976). That statute states, in relevant part,

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Since section 664, and the indictments drafted pursuant to it, make no mention of unlawful agreements, appellee does not argue that the jury's acquittal on counts 10 and 11 conflict with its guilty verdict on Count 1 conspiracy.

U.S.C. § 1954 (1976).[2] For example, in Count 2 of the indictment, the Government alleged:

> 1. Paragraphs 1 through 10 of Count 1 are hereby realleged and incorporated as though set forth in full herein.
>
> 2. In and around December 1975 at Elizabeth in the District of New Jersey and elsewhere the defendants
>
> JOSEPH P. UZZOLINO
> JOSEPH A. UZZOLINO
>
> did knowingly, wilfully and unlawfully *receive and agree to receive* kickbacks, money and things of value from Sam Mor and his business associate, that

---

[2] We recognize, of course, that there is a difference between the language of section 1954 and that used in counts 2 through 9 of this case. By its terms, the statute requires that the Government prove that the defendant agreed to receive *or* received *or* solicited the unlawful payments. The indictment, however, states that the defendant "agreed to receive *and* received" the unlawful payments.

The substitution of the term "and" for "or" did not change the Government's burden in this case. As noted in the trial court's instructions, *Appendix* at 2123, even with the substitution, the Government was required to prove no more than what the statute demands; that is, that Uzzolino agreed to receive or received the kickbacks. *See United States* v. *Blair*, 456 F.2d 514, 518-19 (3d Cir. 1972). *Cf. Turner* v. *United States*, 396 U.S. 398, 420 (1970). The error in the indictments becomes important in this case because it may have suggested to the jury that the Government, in order to prove counts 2 through 9, was required to prove not only that Uzzolino agreed to receive the payments, but that he actually received them. *See* text accompanying notes 12 & 13 *infra*.

> is, approximately $2,500.00 in cash because of and with intent to be influenced with respect to their actions, decisions and duties relating to questions and matters concerning the Pension Fund and the Welfare Fund namely, the collection of the contributions and debt due to those Funds from Towers Transportation, Inc.
>
> In violation of Title 18, United States Code, Section 1954 and 2.

Redacted Indictment at 5, *reprinted in* Appendix at 29 (emphasis added). Counts 2 through 9 of the indictment, referred to by the district court as the "substantive counts" of the indictment,[3] were drafted to detail the specific payments received by Uzzolino for the exercise of his influence.

8. The jury returned a verdict of guilty against appellee on Count 1 only. Following the jury's verdict, the district court directed special interrogatories to the jury. It asked them to verify whether the Government had proved the averments of paragraphs 12 through 15 of the indictment, which state:

> 12. It was a further part of said conspiracy that the defendants and co-conspirators agreed to use their influence to delay, obstruct and hinder the collection of in excess of $80,000 in debts already accrued and due from Towers Transportation, Inc. to the Pension Fund and the Welfare Fund in return for cash to be paid to the defendants and co-conspirators.

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[3] Transcript of Proceedings, *reprinted in* Appendix at 2094-95.

13. It was a further part of said conspiracy that $10,000 was delivered to the defendants and co-conspirators in return for their aid in delaying and obstructing and hindering the action of collection of the outstanding debt of in excess of $80,000 to the Pension Fund and the Welfare Fund due for the period prior to November 7, 1975.

14. It was a further part of said conspiracy that co-conspirators would permit Towers Transportation, Inc. and Far East Truck Leasing, Inc. to employ a large number of owner-operators of trucks who were not members of Local 478 and for whom contributions to the Pension Fund and the Welfare Fund were not required, without interference in return for cash and other items of value to be paid to the defendants and co-conspirators.

15. It was a further part of said conspiracy that from approximately February through September 1976, the defendants and co-conspirators were paid at least $1,000 per month.

The jury answered that it has "found unanimously that the United States had proved paragraph 12 beyond a reasonable doubt, but never has reached an agreement concerning paragraph 13." Transcript of Proceeding, *reprinted in* Appendix at 2241. It answered "no" however, to the trial court's question of whether the United States proved the averments of paragraphs 14 and 15.

Appendix A

9. In a post-verdict motion under F.R.Crim.P. 29(c),[4] appellee argued that the jury's verdict on Count 1 of the indictment be vacated because the government had not proven the crucial element of the conspiracy charge—an agreement between appellee and his alleged co-conspirators to receive kickbacks. Appellee contended that the jury's acquittal on Counts 2 through 9 demonstrated that he had not "agreed to receive" the payments and therefore precluded a finding under Count 1 that appellee was involved in an unlawful agreement or conspiracy.[5] The

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[4] F.R.Crim.P. 29(c) provides in relevant part:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for acquittal may be made or reviewed within 7 days after the jury is discharged. . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

[5] On July 9, 1980, at a hearing before the Honorable Frederick B. Lacey, United States District Judge for the District of New Jersey, appellee's counsel presented his argument:

> The thrust of our position is not inconsistent verdicts but that Count 1 and Counts 2 through 9 inclusive really express the same thing because of the language of the statute. There is, the question is the word "conspiracy" I suggest is synonymous with the word "agreement" as your Honor has charged, and in view of the fact that the entire theory of the government's case was basically on kickbacks and payoffs, there's no other evidence in this case beyond, you know, the acts which the jury considered in the substantive counts.
>
> * * *

(Footnote continued on following page)

government took the position that it now takes on appeal; it argued that the jury's verdict and responses to the special interrogatories indicated only that the jury could not agree as to whether the transfers of money had actually taken place or had taken place with the requisite specific intent for the crimes, not whether the defendant and coconspirators agreed to an illegal arrangement. The district court granted appellee's motion; it entered a judgment of acquittal for appellee on Count 1. The Government appeals.

DISCUSSION

Jurisdiction

10. Before we decide the merits of the Government's appeal, we must first determine whether we have jurisdiction to hear this case. This court's power to hear appeals from the Government in criminal cases is set forth in 18 U.S.C. §3731 (1976):

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the dou-

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(Footnote continued from preceding page)

We suggest that because of the fact that there was an acquittal on an agreement to receive kickbacks that, in effect, is the exact same substantive offense even though it is defined as a conspiracy by virtue of an agreement to receive, and the conspiracy to receive in Count 1.

Transcript of Proceedings at 4, *reprinted in* Appendix at 48-49.

ble jeopardy clause of the United States Constitution prohibits further prosecution.

Section 3731 has been interpreted to apply to post-verdict acquittals under Federal Rule of Criminal Procedure 29 (c), as well as dismissals of indictments or informations. *United States* v. *Schoenhut,* 576 F.2d 1010 (3d Cir.), *cert. denied,* 439 U.S. 964 (1978). *See also United States* v. *Wilson,* 420 U.S. 332 (1975). As long as double jeopardy does not bar the government's appeal, this court is free to review the district court's post-verdict acquittal.[6] *United*

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[6] We believe that the Supreme Court intended this rule to apply even when the post-verdict acquittal is granted because the trial court believes that the jury was convinced beyond a reasonable doubt of the defendant's guilt. *See* text accompanying note 7 *infra.* It has been argued that post-verdict acquittals based upon the merits of the Government's case differ from acquittals based upon trial error; that permitting an appeal from such judgments gives the Government a second try to prove its case and thus violates the double jeopardy clause. We reject this argument. The crucial test for determining whether double jeopardy bars a section 3731 appeal is whether a reversal will lead to successive prosecutions. *United States* v. *DiFrancesco,* 49 U.S.L.W. 4022, 4026 (1980); *Martin Linen Supply,* 430 U.S. 564, 569-70 (1976); *Schoenhut,* 576 F.2d at 1018 n.7. Although the Supreme Court has recently distinguished between reversals based upon trial error and those based upon insufficient evidence, *see Hudson* v. *Louisiana,* 49 U.S.L.W. 4159, 4160 (Feb. 24, 1981); *Burkes* v. *United States,* 437 U.S. 1, 11 (1978); *Scott,* 437 U.S. at 92-101 (dismissal of indictment), it has not repudiated its long-standing principle that double jeopardy presents no bar when there is a verdict that can be reinstated. *Martin Linen Supply,* 430 U.S. at 569-70. The rule emerging from these recent cases is not that double jeopardy comes into play automatically upon a court's acquittal, but rather

(Footnote continued on following page)

States v. *Scott*, 437 U.S. 82, 85 (1977); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1976); *Schoenhut*, 576 F.2d at 1018 n.7.

11. We hold that double jeopardy does not bar this appeal. In *Schoenhut*, this court held:

> [D]ouble jeopardy is not implicated in an appeal from a judgment of acquittal entered after a jury verdict of guilty because there is no possibility that the defendant will have to stand trial again for the same offense. . . . If the Government prevails in this appeal, the jury's guilty verdict will be reinstated.

Id. See also Martin Linen Supply, 430 U.S. at 569-70; *Wilson*, 420 U.S. at 227; *United States* v. *Jenkins*, 420 U.S. 352-53 (1975); *United States* v. *Cahalane*, 560 F.2d 601, 603 n.2 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *United States* v. *Davis*, 560 F.2d 144, 146-47 (3d Cir.), cert. denied, 434 U.S. 839 (1977). As in *Schoenhut*, no new trial will be required in the instant case if the Government prevails upon appeal. *See also United States* v. *Brandon*, 633 F.2d 773, 778-79 (9th Cir. 1980). Rather, the jury's guilty verdict on Count 1 will be reinstated. Accordingly, the Government's appeal is in harmony with the double jeopardy clause and there is jurisdiction under section 3731 for this appeal.

(Footnote continued from preceding page)

that a court, itself, cannot remand a case for a new trial when it finds that the Government has not proved its case against the defendant. It must acquit the defendant and set him free. This rule does not bar appellate review which could, at most, lead to reinstatement of the jury's verdict and not a new trial.

Appendix A

Consistent Verdicts

12. The trial judge granted appellee's Rule 29(c) motion because he believed that the jury, by acquitting Uzzolino on Counts 2 through 9, may have determined that the appellee never entered into an unlawful agreeement to receive kickbacks.[7] Counts 2 through 9 of the indictment included the words "received and agreed to receive." The court viewed the conspiracy in Count 1 as a mere collection of the individual agreements alleged in Counts 2 through 9.[8] Thus, the jury's finding that appellee never made the individual agreements alleged in Counts 2 through 9 could not be reconciled with its finding on Count 1 that there had been a conspiracy or agreement to receive illegal payments.

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[7] The district court admitted that is was at best unclear as to how the jury had considered the overlap in the indictments. In ruling on the Rule 29(c) motion, the court stated:

> Obviously it is impossible for me to determine what cognizance, if any, the jury took of the words "and agree" in Counts 2 through 9. The fact is, however, that the jury may well have been considering those words when it ultimately determined that it would acquit the defendant on those counts.

Transcript at 8-9, *reprinted in* Appendix at 80-81.

[8] The court stated:

> If one takes all the "agreements" that the government alleges are discrete and separate agreements with respect to each substantive transaction from Counts 2 through 9, and gathers them together, one is at a loss to see anything but congruence between the sum thereof and what is charged in Count 1.

Transcript of Proceedings at 7, *reprinted in* Appendix at 79.

13. After reviewing the indictments in the instant case, we come to a different conclusion. First, we note, as did the trial court,[9] that even if a jury's verdicts are inconsistent alone is not an appropriate legal basis to reverse an otherwise valid jury verdict. *See Hamling* v. *United States,* 418 U.S. 87, 101 (1973); *United States* v. *Continental Group, Inc.,* 603 F.2d 444, 455 (3d Cir. 1979), *cert. denied,* 444 U.S. 1032 (1980). The general rule is that inconsistent verdicts will be left to stand as a hallmark to the jury's "assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn* v. *United States,* 284 U.S. 390, 393 (1931) *quoting Steckler* v. *United States,* 7 F.2d 59, 60 (2d Cir. 1925).[10] Only in a rare case will such verdicts demonstrate that there was no legal basis for the jury's decisions. *See, e.g., United States* v. *Hannah,* 584 F.2d 27 (3d Cir. 1978).[11] Certainly, where, as in this case, there is some quetion as

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[9] *See* Transcript of Proceedings at 5, *reprinted in* Appendix at 77.

[10] *See Brandon,* 633 F.2d at 779; *United States* v. *Beck,* 615 F.2d 441, 448 (7th Cir. 1980); *United States* v. *Niemiec,* 611 F.2d 1207, 1210 (7th Cir. 1980). *See generally* Perkins, *Dealings With the Inconsistent Verdict,* 15 Crim. L. Bulletin 405 (1979).

[11] In *Hannah,* the jury's verdict was reversed because under the Government's conceded trial theory, the conspiracy for which the defendant had been acquitted was a predicate offense to the substantive offense of using the mails to facilitate that same conspiracy. The court stated that since the same jury had acquitted the defendant of the very crime he was charged with facilitating, the charge of facilitating "was insufficient as a matter of law." 584 F.2d at 30. The court therefore refused to apply the doctrine of inconsistent verdicts.

to whether the verdicts are inconsistent, the jury's verdicts will not be disturbed. See *United States* v. *Varkonyi*, 611 F.2d 84, 86 (5th Cir.), *cert. denied*, 446 U.S. 945 (1980).

14, Second, and perhaps more importantly for the instant case, we disagree with the trial judge that there is an inconsistency which demonstrates that the jury did not believe that there was sufficient evidence to support the conspiracy charge. If one looks to the indictments submitted to the jury in this case, it appears that the jury may have believed that it was required to find the existence of two elements: (1) an agreement to receive those kickbacks; and (2) the receipt of unlawful kickbacks in order to hold appellee guilty on counts 2 through 9.[12] An acquittal on counts 2 through 9 may well have represented the jury's belief that there was insufficient evidence to prove at least one of the elements. The trial judge assumed that the jury found that the first element was missing; that is, that the government had not proved beyond a reasonable doubt that appellee had agreed to receive the kickback payments. It therefore viewed the jury's acquittal on counts 2 through 9 as undermining its finding on Count I that there was an unlawful arrangement.

15. There is, however, a second plausible interpretation of the jury's acquittal on counts 2 through 9. The jury may have acquitted appellee on the substantive counts because it found that the government failed to prove that appellee actually received the alleged illegal payments. Indeed, the jury's answers to the special interrogatories

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[12] *See* note 2 *supra*.

seem to suggest that it did just that. The jury found unanimously that the United States proved that there was a conspiracy. It never reached an agreement, however, on whether "$10,000 was delivered to the defendants. . . ." *See* text accompanying note 4 *supra.*

16. We believe that the jury's acquittal on the substantive counts is logically consistent with its conviction on Count 1. While appellee entered into an agreement to receive illegal kickbacks, the government was never able to prove that the payments were made. Based on the wording of the indictments and the facts of this case, we find no grounds for holding that the jury believed that there was insufficient evidence to support the conspiracy conviction.[13]

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[13] The appellee also contends that the conspiracy conviction cannot stand because the verdict on Count 1 was deficient in its own right. Paragraph 13 of Count 1 stated:

> It was a further part of said conspiracy that $10,000 was delivered to the defendants and co-conspirators in return for their aid in delaying and obstructing and hindering the action of collection of the outstanding debt of in excess of $80,000 to the Pension Fund and the Welfare Fund due for the period prior to November 7, 1975.

The appellee argues that since the jury apparently never found beyond a reasonable doubt that the $10,000 had been delivered, there was no showing that he committed the conspiracy charged in Count 1.

We disagree. Although the description of the conspiracy in this case included a reference to the substantive violations alleged to have resulted from the unlawful agreement, that reference did not, as a matter of law, constitute an essential element of the

(Footnote continued on following page)

Appendix A

CONCLUSION

17. Accordingly, we will reverse the lower court's judgment and order appellee's conviction on Count 1 to be reinstated. We remand this case to the lower court for further proceedings in accordance with this judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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(Footnote continued from preceding page)

conspiracy charge. In order to prove a conspiracy under §371, the Government was only required to prove: (1) the combination of two persons, (2) a real agreement, (3) an unlawful purpose, and (4) an overt act by one of the conspirators. *United States* v. *Small*, 472 F.2d 818 (3d Cir. 1972). There were several overt acts listed in Count 1 of the indictment which may have supported the jury's verdict. To the extent that paragraph 13 was intended to add to that list, the jury's failure to find that appellee had committed the substantive act of receiving the kickbacks did not invalidate the conspiracy conviction. It is the clear law of this circuit that "the Government is under no obligation to prove every act alleged." *United States* v. *Adamo*, 534 F.2d 31, 38 (3d Cir. 1976). Accordingly, the jury could properly have found appellee guilty of conspiracy without finding that he had committed substantive violations in furtherance of that conspiracy. *Cf. Callanan* v. *United States*, 364 U.S. 587 (1961).

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2287

UNITED STATES OF AMERICA,

Appellant,

vs.

UZZOLINO, JOSEPH P.

(D. C. Criminal No. 79-00366-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 24, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 28, 1980, be, and the same is hereby reversed and the cause remanded for reinstatement of ap-

pellee's conviction on Count 1 and for further proceedings in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS
Clerk

June 15, 1981

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2287

UNITED STATES OF AMERICA,

Appellant,

vs.

JOSEPH P. UZZOLINO,

Petitioner.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges

of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III, Judge

Dated: July 16, 1981

APPENDIX D

Constitutional Provisions Involved

Amendment V

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Relevant Statutes Involved

Title 18 United States Code Section 1954

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided,* That this section shall not prohibit

the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

Title 18 United States Code Section 3731

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the

Appendix E

United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.